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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Carriage of the Transmissions	)	CS Docket No. 98-120
of Digital Television Broadcast Stations	)	
	)	
	)	

COMMENTS OF A&E TELEVISION NETWORKS

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June 11, 2001

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Executive Summary

A&E Television Networks ("AETN") submits that, the Commission was on target in its tentative conclusion that the record in this proceeding cannot support mandatory dual carriage of analog and digital signals during the digital television ("DTV") transition, due to significant First Amendment burdens that would result. However, AETN is concerned that the FCC's call for further review of the First Amendment question was far too narrowly focused. AETN believes that, once the Commission broadens the scope of its constitutional analysis to recognize the burden dual carriage would impose on cable *programmers* in addition to cable operators, it will affirm the *Further Notice*'s initial rejection of dual carriage for analog and DTV stations.

This conclusion is compelled by the substantial disconnect between DTV dual carriage and the statutory goals Congress enunciated in the 1992 Cable Act in adopting analog must carry requirements. Of the three core statutory policy goals the Supreme Court recognized in narrowly upholding analog must carry, *none* are present in the context of digital broadcasting. Dual carriage will not help preserve free over-the-air broadcasting, because DTV programming will be available only to the wealthiest viewers able to afford the luxury of digital equipment. Dual carriage will not promote programming diversity in that, as DTV stations replace cable programming on cable systems lacking the capacity to carry both, valuable cable programming will be sacrificed in exchange for duplication of analog broadcast signals. Finite cable system capacity will also prevent dual carriage from assisting marginal broadcast stations to be more competitive, as cable operators will fill the statutorily mandated one-third of their systems dedicated to must carry with the most attractive stations. Additionally, dual

carriage will not promote fair competition because it will serve only to give broadcasters additional bargaining leverage – on top of that already enjoyed due to analog must carry requirements – and to make negotiations between cable operators and independent programmers more difficult.

The Commission cannot support dual carriage by reference to policy goals that do not appear in the Act. Such goals have not been adopted through the legislative process or approved by the Supreme Court as justifying the burden on cable operator and cable programmer speech any must carry regime entails. Moreover, even if goals such as hastening the digital transition or promoting efficiency and innovation could provide constitutional support for digital must carry, dual carriage would not advance those interests.

Finally, the Commission will not find support for the constitutionality of dual carriage in the channel capacity survey it is conducting, regardless of its outcome. There is no rational basis for putting cable programmers at the competitive disadvantage vis-à-vis marketing costs and regulatory treatment that a dual carriage requirement would impose. This is particularly true where, as broadcast interests have all but conceded, there is not enough cable system capacity for all programmers seeking access.

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A&E Television Networks ("AETN"), hereby submits comments in response to the *Further Notice of Proposed Rulemaking* in the above-captioned proceeding ("*Further Notice*"). 1/ In AETN's initial comments in this proceeding, we pointed out that the proposals for digital must carry were unsupported by the statutory goals of the 1992 Cable Act and that imposing digital must carry obligations would violate the First Amendment. 2/ We also noted that the must carry proposals failed to address the main bottlenecks to the digital broadcast conversion, but that broadcasters had adopted a position of "regulation for thee but not for me" in support of possible rules. 3/

This *Further Notice* is premised on the same concerns we highlighted in our initial comments. The Commission tentatively concluded that "dual carriage . . .

1/ *Carriage of Digital Television Broadcast Stations*, FCC 01-22, CS Docket No. 98-120 (rel. January 23, 2001).

2/ *See* Comments of A&E Television Networks on *DTV Must Carry NPRM*, 13 FCC Rcd 15092, filed October 13, 1998 ("AETN Initial Comments") at 21-30 (DTV must carry requirements are inconsistent with statutory objectives); 33-41 (DTV must carry requirements are unconstitutional).

3/ *See* Reply Comments of A&E Television Networks on *DTV Must Carry NPRM*, 13 FCC Rcd 15092, filed December 22, 1998 ("AETN Reply Comments") at 9-19.

burden[s] cable operators' First Amendment interests substantially more than is necessary to further the government[ ] interests" that serve as the constitutional lynchpin for the Act's must carry provisions. *Further Notice*, ¶¶ 3, 112. Accordingly, the purpose of the further inquiry is to develop a record that addresses First Amendment problems arising from dual must carry requirements during the digital television ("DTV") transition. *Id.* ¶¶ 12, 113-16, 123-27. However, although AETN believes the Commission generally is on the right track, we believe that the *Further Notice* seeks to assess only the impact of must carry on cable operators, and that it fails to address the separate First Amendment concerns of cable *programmers* such as AETN.

Must carry is inherently unfair because it favors one class of programmers over another. The sting of such a government-mandated preference is especially onerous to AETN, which is neither owned nor controlled by any cable operator. Not only would a new DTV must carry regime officially exclude AETN from regulatory benefits, but it would reinforce collateral preferences enjoyed by other programmers that may gain carriage commitments through retransmission consent arrangements. Such policies undermine the Commission's commitment to promoting competition, because they award marketplace advantages to some competitors without regard to the quality of the programming being offered or viewers' preferences.

AETN has always been content to compete in the marketplace based on the quality of our service to the public, and has never asked the government to guarantee our niche. Through the A&E Network, The History Channel, the BIOGRAPHY® Channel and History International™, AETN provides high-quality educational, informa-

tional and entertainment programming. 4/ Since the filing of AETN's Initial Comments, A&E's penetration has grown from 71 million cable households to more than 80 million households, and The History Channel's penetration has advanced from 50 million to 70 million households. During that time, A&E has maintained a prime-time schedule of over 80 percent original programming, while The History Channel's original prime-time programming has expanded from over 75 percent to 95 percent. Current examples include a special BIOGRAPHY® series on the French Impressionists, and a History Channel original "Egypt – Beyond the Pyramids." 5/ This valuable programming has garnered substantial viewer support and broad acceptance in the market, yet it still faces the risk of being disfavored and displaced if the FCC adopts must carry requirements that unfairly benefit broadcasters at the expense of cable programmers.

AETN respectfully asks that the Commission refocus its inquiry in this *Further Notice* to take into account the First Amendment impact of DTV must carry on cable programmers. In doing so, we believe that the FCC will find that it cannot answer the constitutional questions it posed merely by toting up cable operators' channel capacity to determine if the number of programmers to be sacrificed for the sake of the

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4/ AETN provides significant educational tie-ins in conjunction with its programming through A&E Classroom and History Channel Classroom offerings. The Classroom program provides teachers with resources to help plan class discussions and research projects based on AETN's shows, and A&E Classroom and The History Channel Classroom provide an ideal way to enhance basic skills, present complex material, and make the learning experience more constructive, enriching and rewarding for both teachers and students. The programs also encourage teachers to exchange lesson plans and other teaching ideas keyed off AETN's cable programming.

5/ Like much of AETN's programming, these new original programs include online links to study guides.

digital transition fall within some measure of tolerance for constitutional balancing. Rather, the constitutional problems of digital must carry are far more basic, because the policy contradicts the fundamental premise that it is "wholly foreign to the First Amendment" for the government to "restrict the speech of some elements of our society in order to enhance the relative voice of others." *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790-791 (1978), quoting *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976).

I. THE COMMISSION MUST BROADEN ITS CONSTITUTIONAL ANALYSIS IN THIS PROCEEDING

By focusing solely on the burden dual carriage would impose on cable operator speech, *e.g.*, *Further Notice* at ¶¶ 3, 112, 115, 118, the Commission sets up a substantially incomplete First Amendment paradigm for its constitutional analysis. Although cable operators must comply with carriage mandates, the Supreme Court recognized that programmers bear the brunt of any must carry rule. *Turner Broadcasting Sys. v. FCC*, 512 U.S. 622, 645 (1994) ("*Turner I*") ("Broadcasters, which transmit over the airwaves, are favored [in a must carry scheme], while cable programmers, which do not, are disfavored."). Under this preference, must carry "deprives a certain class of video programmers – those who operate cable channels rather than broadcast stations – of access to over one-third of an entire medium." *Id.* at 675 (O'Connor, J., concurring in part and dissenting in part).

Moreover, it is incumbent on the Commission to affirmatively demonstrate the need for any must carry rule – it may not simply rely on previous congressional findings regarding analog must carry. Any time the Commission implements a provision of the Act that affects speech activities, it must ensure that its actions comport with the

First Amendment, even if similar efforts have survived previous constitutional scrutiny. For example, after the *Further Notice* was issued, the United States Court of Appeals for the D.C. Circuit held that it was insufficient for the Commission simply to rely on prior congressional findings when it seeks to regulate cable speech. 6/ In *Time Warner v. FCC*, the court held that the Commission must have record support for rules that restrict cable operator speech. Even where the Commission has unambiguous statutory authority to adopt rules – far from the situation with digital must carry – it must nevertheless develop specific support for any rules it adopts. *Id.* at 1130 (the FCC "must show a record that validates the *regulations*, not just the abstract statutory authority") (emphasis added). As the court noted, "[c]onstitutional authority to impose some limit is not authority to impose any limit imaginable." *Id.* at 1129-1130.

Accordingly, the Commission cannot simply assume it has the constitutional authority to adopt a dual must carry requirement to the extent its channel survey suggests that the collateral damage to cable operators is not too great. Rather, the FCC must satisfy a two-step analysis in which it addresses the following questions:

- Has an affirmative case been made to support mandatory carriage requirements in terms that comport with the Cable Act?
- If so, is there sufficient evidence to conclude that the rules would not impose unconstitutional burdens on the cable industry, including cable programmers?

6/ *See, e.g., Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126, 1130 (D.C. Cir. 2001) ("*Time Warner II*") (vacating as unconstitutional the FCC's rules implementing the horizontal and vertical cable ownership limits in Section 613 of the Act, even though the court had previously denied a facial constitutional challenge to Section 613) (discussing *Time Warner Entertainment Co. v. U.S.*, 211 F.3d 1313 (D.C. Cir. 2000)).

As demonstrated below, AETN believes that if the Commission properly focuses on the issues necessary to fully answer the constitutional questions, it will refrain from adopting dual must carry requirements.

II. THERE IS A SUBSTANTIAL DISCONNECT BETWEEN DTV DUAL CARRIAGE AND THE STATUTORY GOALS UNDERLYING THE ACT'S MUST CARRY PROVISIONS

Once the analysis in this *Further Notice* is focused correctly on the statutory interests Congress identified in the 1992 Act, the Commission inevitably will find that a dual must carry requirement is inconsistent with the public interest. In trying to make an affirmative case for a must carry mandate, those who advocate rules cannot rely on predictive judgments or a generalized interest in promoting "diversity." *Time Warner II*, 240 F.3d at 1134-1135. Nor may proponents of must carry deviate from the interests articulated by Congress in the 1992 Cable Act.

A. The FCC May Not Adopt a Dual Carriage Requirement Based on Policy Goals that Have Been Neither Set by Congress Nor Accepted by the Supreme Court as Supporting Must Carry Rules

The legitimacy of any must carry requirement – including dual carriage for the DTV transition – must be analyzed in terms of the statutory purposes of the 1992 Cable Act. *See Turner Broadcasting Sys. v. FCC*, 520 U.S. 180, 190-191 (1997) ("*Turner II*") (declining to consider rationales that are "inconsistent with Congress' stated interests in enacting must carry" in reviewing the rules' constitutionality). In 1992, Congress identified three interests to be served by must carry: (1) preserving free over-the-air local broadcasting, (2) promoting widespread dissemination of information from a multiplicity of sources, and (3) promoting fair competition. *Id.* at 189 (quoting *Turner I*,

512 U.S. at 662); *see also* Conf. Rpt. 102-862, 102nd Cong., 2d Sess. (1992) at 58. In assessing the constitutionality of a potential dual carriage requirement for the DTV transition, the Commission must determine whether the requirement would pass muster under these enunciated policy goals. While the FCC has acknowledged that these three interests are the relevant statutory goals, *Further Notice*, ¶ 3, it also posited "a number of statutory and public policy goals inherent in Section 614 and 615, and other parts of the Act." *Id.*, ¶ 4. These new goals include "maximizing incentives for inter-industry negotiation," "promoting efficiency and innovation in new technologies and services," and "maximizing the introduction of digital broadcast television." *Id.*

These additional policy goals were not set forth by Congress nor analyzed by the Supreme Court in its *Turner* decisions. As such, the Commission may not rely on these new, additional policy objectives it believes are "inherent" in the must carry and other cable provisions of the Act. Analog must carry survived constitutional scrutiny in the *Turner* cases by only the narrowest of margins. In upholding the requirements, the Supreme Court relied heavily on the stated statutory objectives and extensive congressional findings related to them. *Compare Turner II* 520 U.S. at 190-193, 195-211. 219-222; *with Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434 (D.C. Cir. 1985); *Century Communications Corp. v. FCC*, 835 F.2d 292 (D.C. Cir. 1987) (both striking down must carry rules in the absence of congressional findings). The Commission may not now, for digital must carry, simply concoct new statutory objectives that dual carriage – or any other digital must carry requirement – would purportedly advance.

Even if the FCC could justify performing First Amendment analyses using newly recognized must carry policy goals, such as "maximizing DTV introduction" or "providing incentives for inter-industry negotiation," *Further Notice*, ¶ 4, a dual carriage rule still could not survive constitutional scrutiny, because it would fail to advance those interests. For example, while a recent Congressional Budget Office ("CBO") report suggests a "strong digital must carry requirement" might hasten the DTV transition, it also identified a variety of other factors that will affect the transition. *Completing the Transition to Digital Television*, Congressional Budget Office, at xi (Sept. 1999) ("CBO REPORT"). These include the "largest obstacle" of obtaining tower space for second antennas needed to broadcast new digital signals; consumer adoption of DTV equipment, particularly by those not paying for television programming; and lack of incentives for transitioning from analog to digital broadcasting, such as spectrum fees that could "create an incentive, now absent, for broadcasters to work for the transition's timely end." CBO Report at ix-xi. This range of variables, and the unpredictable role each might play in the DTV transition, indicates that the FCC cannot rely on a dual carriage requirement to help "maximize" DTV's introduction. 7/

Similarly, guaranteeing broadcasters carriage on cable systems for not only their analog signal, but for their (duplicative) digital signal as well, would do nothing to aid inter-industry negotiation. Giving additional bargaining power that mandatory dual carriage represents to large-market affiliates of the largest networks would only

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7/ That these variables will play a yet-to-be-determined role in the evolution of DTV not only precludes the Commission from finding that dual carriage will advance the new

further tilt the balance of bargaining power toward these broadcasters. 8/ As a general matter, affording broadcasters a carriage right for their analog signal, *plus* the right to demand carriage for their digital signal, while independent cable programmers like AETN must compete for carriage in the marketplace, only makes negotiation between independent programmers and cable operators that much more difficult. In view of the foregoing, the FCC could hardly argue that a dual carriage requirement would advance the newly identified interests in the *Further Notice* in the "direct and material way" the Supreme Court requires. *Turner I*, 512 U.S. at 664.

B. Existing Policy Goals Underlying Must Carry Obligations Conflict With Any DTV Dual Carriage Requirement

Of the statutory goals the Supreme Court relied upon in its review of analog must carry rules, *none* would be advanced by a dual carriage requirement. To the contrary, dual carriage would *undermine* these statutory policy goals.

1. Dual carriage will not preserve free over-the-air TV for those who cannot afford cable

A dual carriage requirement would not help preserve of free-over-the-air local broadcasting, which the Supreme Court cited as the "overriding congressional purpose" of must carry. *Turner I*, 512 U.S. at 647. Specifically, the Supreme Court

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must carry interests in the *Further Notice*, it also precludes a finding that dual carriage will advance the must carry interests the Supreme Court accepted in the *Turner* cases.

8/ *See Further Notice*, ¶ 34 (noting that the FCC will "continue to monitor . . . potential anticompetitive conduct by broadcasters" in the context of broadcasters requiring cable operators to carry signals of programming affiliated with the broadcasters' analog signal as a precondition for carriage of the latter, allowing cable operators to "demonstrate harm to themselves or subscribers due to tying arrangements").

quoted the legislative findings, on which it heavily relied to narrowly uphold analog must carry, to acknowledge that Congress sought to "promot[e] the continued availability of [ ] free television programming, *especially for viewers who are unable to afford other means of receiving programming.*" *Id.* at 646 (emphasis added). However, where analog must carry was designed to ensure continued availability of programming by stations consumers were accustomed to viewing, using equipment they already owned, digital must carry is directed toward a new technology to which no such "continued availability" interest attaches.

Unlike analog must carry requirements, digital must carry will assist only cable subscribers who are sufficiently wealthy to afford a digital television. As such, a dual carriage requirement would promote a form of television service that will initially be available only to the very richest viewers who can afford to spend several thousand dollars on a new television. This is completely at odds with the government's stated interest in adopting must carry to protect noncable households "from loss of *regular* television broadcasting service." *Turner II*, 520 U.S. at 190 (emphasis added). Whatever public interest benefit there may be in attempting to add new service to the most affluent cable homes – or even affluent non-cable homes – there is no connection to the situation that prompted Congress to adopt must carry rules in the first place.

2. Dual carriage will not promote programming diversity

Dual carriage will not advance, and in most instances will actually undermine, the statutory interest in widespread dissemination of information from diverse sources. First, given the amount of program duplication anticipated – and that will ultimately be required – a dual carriage requirement will not ensure provision of much, if

any, additional programming. The FCC is aware of this, inasmuch as its DTV rules not only permit, but *require* duplication of analog and digital television transmissions. *See Further Notice*, ¶ 68 (citing *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, 12 FCC Rcd 12809, 12832 (1997) (requiring DTV stations to simulcast 50 percent of the programming of their analog channel by April 21, 2003; 75 percent by April 21, 2004; and 100 percent by April, 1 2005)). More importantly, the Commission acknowledges that "[c]able subscribers would not immediately benefit from a dual carriage rule if there is little to view but duplicative material." *Further Notice*, ¶ 120. This is far different from analog must carry, where the Act expressly precludes signal duplication among must carry stations. *See* 47 U.S.C. § 614(b)(2)(B).

Even in instances where there may be sufficient cable system capacity to accommodate full dual carriage of all eligible DTV stations without displacing existing cable programming, the dual carriage requirement will not advance the dissemination of information from a diversity of sources. Dual carriage would instead, at most, result in favored programmers being represented twice. Not only does this fail to increase the number of sources, it provides some programmers (*i.e.*, broadcasters) with an unfair advantage.

In actuality, dual carriage will *diminish* the number of sources disseminating information in any case where lack of system capacity requires cable operators to drop cable channels in order to accommodate duplicative broadcast programming in a digital format. This, too, the Commission has already recognized, when it noted that "there is a risk that if carriage were mandated, cable subscribers

would lose existing cable programming services that would be replaced on the channel line-up by digital television signals with less programming." *Further Notice*, ¶ 120.

3. Dual carriage will not assist in making marginal TV stations more competitive

A dual carriage requirement would also defeat the interest of preserving local broadcasting by undercutting the perceived needs of those broadcasters the Supreme Court recognized are "most in jeopardy" and primarily in need of analog must carry. *See Turner I*, 512 U.S. at 673 (Stevens, J., concurring) ("broadcasters who gain access [to cable systems] via . . . must-carry [ ] are apt to be the most economically vulnerable ones"). The DTV transition schedule focuses on implementation in the largest markets first by affiliates of the largest broadcast networks. As a result, DTV dual carriage requirements would assist only the largest networks in the largest markets, who have the initial DTV obligations. This diverges significantly from the purposes served by analog must carry, which sought to protect broadcasters who lack market power to rely on the retransmission consent provisions of the 1992 Act.

The Commission recognized that dual carriage requirements may actually *harm* weaker broadcast stations. *See Further Notice*, ¶ 119 (dual carriage "may result in on-air digital signals being carried, at the expense of . . . yet-to-air digital signals [not] carried because the operator's one-third cap has been met"); *see also* 47 U.S.C. § 534(b)(1)-(2). Given that stations electing retransmission consent count toward the maximum a cable operator is required to carry, 9/ a cable operator with sufficiently

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9/ *See Further Notice*, ¶ 42 ("Under the existing carriage structure, all local . . . signals that are carried, whether they have chosen retransmission consent or must

limited capacity could ostensibly fulfill its must carry obligations from among, first, broadcast stations it agrees to carry, and then, the remaining stations based on their attractiveness to the cable operator's subscribers. Invariably, the broadcasters that Congress sought to assist in the 1992 Cable Act will be excluded from any benefits of DTV must carry.

Broadcast interests recognized this problem in their petitions to reconsider the *Further Notice*. For example, the NAB has asked the Commission to revise the Act in arguing that carriage priority must first be afforded to one signal of every local broadcaster. NAB/MSTV/ALTV Petition for Reconsideration and Clarification at 17 ("If it is literally applied [Section 614(b)(2)] could defeat the purpose of the must carry statute to preserve a vibrant local broadcast service to the public by allowing carriage of two signals of one broadcaster first and none of another, more vulnerable station, leading ultimately to a reduction in the diversity of stations carried."). However, this is not in the law, and the broadcasters cannot legitimately ask the FCC to amend an act of Congress. The broadcasters' position stands as a stark admission that the purposes underlying analog must carry do not match the proposals for DTV must carry, and that cable programmers would be sacrificed if the Commission imposes a dual carriage requirement.

4. Dual carriage will not promote fair competition

Elevating broadcasters generally, and DTV stations specifically (as would be the case in a dual carriage regime), to preferred status over cable programmers

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carry, are counted as part of the . . . cap calculation. This . . . will continue to apply in the digital carriage context.") (footnote omitted).

would do nothing to enhance fair competition. As noted above, a dual carriage requirement would undermine the ability of weaker broadcast stations to compete. Moreover, by favoring stronger broadcasters, dual carriage rules would place cable programmers at a competitive disadvantage. Cable networks must negotiate their way onto cable systems and/or build sufficient viewer support or interest to warrant carriage. Analog broadcasters, on the other hand, are given a free pass by way of Sections 614 and 615 of the Act and the Supreme Court's *Turner* decisions. As this discussion suggests, the main thrust of the FCC's effort in the *Further Notice* – polling cable operators on system capacity – does not address the inherent unfairness of a dual carriage requirement. This final point is discussed in more detail in the next section.

III. THE CHANNEL CAPACITY SURVEY FAILS TO ADDRESS THE NEGATIVE IMPACT DUAL CARRIAGE WOULD HAVE ON CABLE PROGRAMMERS

Not only is a cable system channel capacity survey unsuited to make an affirmative case for dual carriage requirements, it also cannot fully address the negative consequences of carriage requirements on cable programmers. Even if the survey garnered some evidence in support of a dual carriage requirement, such rules would nevertheless fail constitutional scrutiny to the extent they burden more speech than necessary to further their asserted goals. *See Time Warner II*, 240 F.3d at 1130 (citing *U.S. v. O'Brien*, 391 U.S. 367, 377 (1968); *Turner II*, 520 U.S. at 189). 10/ The FCC

10/ Any loss of cable service due to channel capacity limitations is excessive where, as here, non-regulatory means exist to serve the government's interest. Specifically, the FCC has recognized that it has become easier to use antennas for television reception and that legal barriers to such reception have diminished. *See DTV Must Carry NPRM*, ¶ 16 (noting that "A/B" switches may now be built in to television receivers and easily controlled by remote control devices). While analog must carry was upheld

must also consider the adverse effects of DTV must carry on cable programmers in view of the legal preference that would be created by a dual carriage requirement for broadcasters. In addition to the possibility of channel displacement (that the survey will likely address), a regulatory preference for broadcasters would create an unfair advantage in at least two areas – cost-to-market and regulatory advantages – that uniquely burden cable programmers.

A dual carriage requirement that results in DTV stations being carried on capacity that otherwise would be available for cable programmers would impose significant direct and transactional costs on independent cable networks seeking to achieve and sustain carriage on cable systems. Presently, broadcasters need only assert their must carry rights to obtain carriage of their analog signal by cable operators. Independent cable programmers, on the other hand, must assume the costs of marketing their programming to make it attractive to cable operators, as well as the costs of negotiating and executing terms of carriage with any cable operator they manage to win over. Cable programmers must compete in the marketplace for channel space, and generally must agree to pay marketing support and other consideration to secure carriage. Conversely, broadcasters can not only avoid paying for carriage by simply asserting must carry rights, Section 614(b)(10) *prohibits* them from paying for it.

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based on findings that "[m]ost subscribers to cable television systems do not or cannot maintain antennas to receive broadcast television services, do not have input selector switches to convert from a cable to antenna reception system, or cannot otherwise receive broadcast television services," *Turner I*, 512 U.S. at 633 (quoting Cable Act, § 2(a)(17)), A/B switch evolution has eliminated the risk that cable operators could "silence the voice of competing speakers." *Id.* at 656; *see also* AETN Initial Comments at 36.

If the Commission imposes a dual carriage requirement, broadcasters will have garnered a *second* free ride as to the marketing and direct costs of attaining cable carriage. Meanwhile, the costs attendant to cable carriage for independent cable programmers, which already exceed those of broadcasters, will only rise as they compete for a decreasing number of available channels. 11/ Given the significant role marketing costs play in today's video programming industry, conferring this kind of regulatory advantage on DTV stations is a substantial burden on cable programmers that must compete head-to-head with broadcasters for programming, viewership, and advertising support.

Any grant of mandatory carriage rights also bestows a host of regulatory advantages on favored broadcasters. For example, under the Cable Act's tier placement and penetration requirements, programmers entitled to must carry status must be provided on a "separately available basic service tier to which subscription is required for access to any other tier of service," unless the cable operator is subject to effective competition. 12/ A dual carriage requirement would serve only to double the

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11/ By way of comparison, prior to adopting 1992 Cable Act provisions prohibiting cable operators from accepting, and broadcasters from making, payments for carriage, Congress found that, among broadcasters providing consideration for carriage, more than half made payments in excess (in dollars not adjusted for inflation over the intervening decade) of $45,000 per year. S. Conf. Rpt. 102-92, 102nd Cong., 1st Sess. (1991) at 82. Removing this burden from broadcasters, while it has only grown heavier for cable programmers, confers a significant advantage on the ability to present broadcast programming to the detriment of cable programming.

12/ 47 U.S.C. § 543(b)(7)(A); *see also Further Notice*, ¶ 101. Although the FCC is proposing to allow cable operators to carry DTV signals on a digital tier if carried pursuant to retransmission consent, *see id.*, ¶ 132, such flexibility would not apply to must carry signals.

number of stations entitled to this benefit. This is in addition to the regulatory advantage already enjoyed by broadcasters that can leverage retransmission consent tying arrangements to acquire more channel space at the expense of independent cable programmers like AETN. See *Further Notice*, ¶ 34. 13/

Finally, it should be noted that the broadcast industry has all but conceded the fact that there will be insufficient channel capacity to accommodate all needs under a must carry regime, and that some programmers must be sacrificed. The broadcasters' plan, not surprisingly, is that cable programmers should be the networks placed at risk. In a joint petition seeking reconsideration and clarification of the *Further Notice*, the National Association of Broadcasters, the Association for Maximum Service Television and the Association of Local Television Stations (collectively "NAB") request that the FCC adopt a rule to accord carriage priority to one signal of every local broadcaster before any station is duplicated through carriage of a second signal. 14/ NAB makes this request out of concern that "carriage of two signals of one broadcaster

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13/ *See also, e.g.*, Paul Kagan Associates, Inc., CABLE PROGRAM INVESTOR at 8 (March 17, 2000) (recounting Disney/ABC efforts to condition retransmission of Houston affiliate KTRK on basic carriage of the Disney Channel, Toon Disney and SoapNet); Mavis Scanlon, *The Tangled Vines of TV Ownership*, CABLE WORLD at 12 (January 15, 2001) (noting that "Disney's bargaining chips include its ownership of the ABC television network and ESPN"); Phillips Business Information, Inc., *Retrans Insanity: NBC Wraps Up Olympics*, CABLEFAX (September 6, 2000) (discussing retransmission deals involving the Olympics and MSNBC and CNBC).

14/ *See* NAB/MSTV/ALTV Petition for Reconsideration and Clarification filed in CS Docket No. 98-120, April 25, 2001, at 17-18 ("NAB Petition"); *see also Petitions for Reconsideration and Clarification of Action in Rulemaking Proceedings*, Report No. 2481 (rel. May 3, 2001), 66 Fed. Reg. 23929 (May 10, 2001) (providing public notice of petitions for reconsideration of the FNPRM filed by, *inter alia*, NAB). AETN incorporates by reference herein the opposition it filed in this docket on May 25, 2001, in response to the NAB Petition and other petitions for reconsideration of the FNPRM.

first and none of another, more vulnerable station," could lead to "reduction in the diversity of stations carried." NAB Petition at 17.

These "vulnerable" stations, however, would not face this dilemma unless cable operators lack capacity to carry all stations and/or they have fulfilled their must carry commitments by carrying both the digital and analog signals of preferred "non-vulnerable" stations. 15/ For there to be enough "vulnerable" stations at risk of losing carriage to warrant inclusion of this issue in the NAB Petition, there must be serious concerns regarding cable operator capacity to accommodate all programmers seeking carriage. Though NAB cited only the burden that may be shouldered by "vulnerable" broadcasters, it is clear the burden will fall equally on cable programmers currently carried on cable systems that may fall victim to capacity constraints. Thus, NAB concedes the capacity issue, and at the same time seeks an FCC rule that would eviscerate Section 614(b)(2) of the Act, 16/ while underscoring the serious First Amendment issues a DTV dual carriage requirement would raise.

CONCLUSION

The Commission should affirm its tentative conclusion that the First Amendment precludes adoption of any DTV dual carriage requirement. The disconnect between the statutory policy goals underlying analog must carry, and digital must

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15/ 47 U.S.C. § 534(b)(1)-(2) (establishing limits on number of channels cable operators must carry). *See also* AETN Initial Comments at 44.

16/ *See id.*, § 534(b)(2) (granting cable operators discretion to select, subject to certain exceptions, which stations to carry when the number of local commercial television stations exceeds the maximum number the cable operator is required to carry).

carry's inability to further them, will not be overcome in this proceeding by the record created initially, or in response to the *Further Notice*. Additionally, the FCC's cable system capacity survey can neither adequately capture nor justify the burden placed on the speech of independent cable programmers if DTV stations are elevated to preferred status through a dual carriage requirement. There is, in short, no way to overcome the constitutional problems that would plague a DTV dual carriage requirement. Therefore, the Commission must reject consideration of any such requirement.

Respectfully submitted,

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June 11, 2001